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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 WALTER CHARLES BITTICK,) Case No. EDCV 15-0528-JPR
12)
13 Plaintiff,)
14) MEMORANDUM OPINION AND ORDER
15 v.) REVERSING COMMISSIONER
16)
17 CAROLYN W. COLVIN, Acting)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22 _____)
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18 **I. PROCEEDINGS**

19 Plaintiff seeks review of the Commissioner's final decision
20 denying his application for Social Security disability insurance
21 benefits ("DIB"). The parties consented to the jurisdiction of
22 the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c).
23 The matter is before the Court on the parties' Joint Stipulation,
24 filed December 4, 2015, which the Court has taken under
25 submission without oral argument. For the reasons stated below,
26 the Commissioner's decision is reversed and this matter is
27 remanded for further proceedings.
28

1 **II. BACKGROUND**

2 Plaintiff was born in 1963. (Administrative Record ("AR")
3 136.) He completed the 11th grade and worked as a tow-truck
4 operator and truck driver. (AR 152-53, 159.)

5 On February 15, 2012, Plaintiff applied for DIB, alleging
6 that he had been unable to work since June 4, 2011, because of a
7 "[k]nee injury." (AR 63, 136, 152.) After his application was
8 denied, he requested a hearing before an Administrative Law
9 Judge. (AR 92-93.) A hearing was held on August 22, 2013, at
10 which Plaintiff, who was represented by counsel, testified, as
11 did a vocational expert. (AR 32-62.) In a written decision
12 issued September 20, 2013, the ALJ found Plaintiff not disabled.
13 (AR 13-21.) On January 22, 2015, the Appeals Council denied
14 Plaintiff's request for review and incorporated newly submitted
15 evidence into the administrative record.¹ (AR 1-5.) This action
16 followed.

17 **III. STANDARD OF REVIEW**

18 Under 42 U.S.C. § 405(g), a district court may review the
19 Commissioner's decision to deny benefits. The ALJ's findings and
20

21 ¹ Social Security Administration regulations "permit
22 claimants to submit new and material evidence to the Appeals
23 Council and require the Council to consider that evidence in
24 determining whether to review the ALJ's decision, so long as the
25 evidence relates to the period on or before the ALJ's decision."
26 Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1162 (9th
27 Cir. 2012); see also 20 C.F.R. § 404.970(b). "[W]hen the Appeals
28 Council considers new evidence in deciding whether to review a
decision of the ALJ, that evidence becomes part of the
administrative record, which the district court must consider
when reviewing the Commissioner's final decision for substantial
evidence." Brewes, 682 F.3d at 1163; accord Taylor v. Comm'r of
Soc. Sec. Admin., 659 F.3d 1228, 1232 (9th Cir. 2011).

1 decision should be upheld if they are free of legal error and
2 supported by substantial evidence based on the record as a whole.
3 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
4 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
5 evidence means such evidence as a reasonable person might accept
6 as adequate to support a conclusion. Richardson, 402 U.S. at
7 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
8 It is more than a scintilla but less than a preponderance.
9 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
10 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
11 substantial evidence supports a finding, the reviewing court
12 "must review the administrative record as a whole, weighing both
13 the evidence that supports and the evidence that detracts from
14 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
15 720 (9th Cir. 1996). "If the evidence can reasonably support
16 either affirming or reversing," the reviewing court "may not
17 substitute its judgment" for the Commissioner's. Id. at 720-21.

18 IV. THE EVALUATION OF DISABILITY

19 People are "disabled" for purposes of receiving Social
20 Security benefits if they are unable to engage in any substantial
21 gainful activity owing to a physical or mental impairment that is
22 expected to result in death or has lasted, or is expected to
23 last, for a continuous period of at least 12 months. 42 U.S.C.
24 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
25 1992).

1 A. The Five-Step Evaluation Process

2 The ALJ follows a five-step sequential evaluation process to
3 assess whether a claimant is disabled. 20 C.F.R.

4 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th
5 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the
6 Commissioner must determine whether the claimant is currently
7 engaged in substantial gainful activity; if so, the claimant is
8 not disabled and the claim must be denied. § 404.1520(a)(4)(i).

9 If the claimant is not engaged in substantial gainful
10 activity, the second step requires the Commissioner to determine
11 whether the claimant has a "severe" impairment or combination of
12 impairments significantly limiting his ability to do basic work
13 activities; if not, the claimant is not disabled and the claim
14 must be denied. § 404.1520(a)(4)(ii).

15 If the claimant has a "severe" impairment or combination of
16 impairments, the third step requires the Commissioner to
17 determine whether the impairment or combination of impairments
18 meets or equals an impairment in the Listing of Impairments
19 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
20 1; if so, disability is conclusively presumed.

21 § 404.1520(a)(4)(iii).

22 If the claimant's impairment or combination of impairments
23 does not meet or equal an impairment in the Listing, the fourth
24 step requires the Commissioner to determine whether the claimant
25 has sufficient residual functional capacity ("RFC")² to perform

27 ² RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. § 404.1545; see Cooper v.

(continued...)

1 his past work; if so, he is not disabled and the claim must be
2 denied. § 404.1520(a)(4)(iv). The claimant has the burden of
3 proving he is unable to perform past relevant work. Drouin, 966
4 F.2d at 1257. If the claimant meets that burden, a prima facie
5 case of disability is established. Id.

6 If that happens or if the claimant has no past relevant
7 work, the Commissioner then bears the burden of establishing that
8 the claimant is not disabled because he can perform other
9 substantial gainful work available in the national economy.

10 § 404.1520(a)(4)(v); Drouin, 966 F.2d at 1257. That
11 determination comprises the fifth and final step in the
12 sequential analysis. § 404.1520(a)(4)(v); Lester, 81 F.3d at 828
13 n.5; Drouin, 966 F.2d at 1257.

14 B. The ALJ's Application of the Five-Step Process

15 At step one, the ALJ found that Plaintiff had not engaged in
16 substantial gainful activity since June 4, 2011, the alleged
17 onset date. (AR 15.) At step two, he concluded that Plaintiff
18 had the severe impairments of "left knee sprain and strain."
19 (Id.) He found that Plaintiff had complained of "right knee
20 repetitive trauma, hip pain, sleep apnea, osteoarthritis, and
21 [being] overweight," but that those conditions had only a minimal
22 effect on his ability to engage in work-related activities and
23 were therefore not severe. (Id.) At step three, the ALJ
24 determined that Plaintiff's impairments did not meet or equal any
25 of the impairments in the Listing. (AR 15-16.) At step four, he

27 ² (...continued)
28 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 found that Plaintiff had the RFC to perform a full range of light
2 work; specifically, he could

3 lift, carry, push, and pull 20 pounds occasionally and 10
4 pounds frequently. He can stand and walk for about six
5 hours out of an eight hour workday, and he can sit for
6 about six hours out of an eight hour workday.

7 (AR 16.) Based on the VE's testimony, the ALJ concluded that
8 Plaintiff could not perform his past relevant work but could
9 perform other work that existed in sufficient numbers in the
10 national economy. (AR 19-20.) Accordingly, he found Plaintiff
11 not disabled. (AR 21.)

12 **V. DISCUSSION**

13 Plaintiff contends that the ALJ erred in failing to (1)
14 provide clear and convincing reasons for discounting his
15 credibility and (2) properly consider his "severe impairment of
16 obesity." (J. Stip. at 4.) Because the Court agrees that the
17 ALJ did not properly assess Plaintiff's credibility, it does not
18 reach his other contention.

19 A. The ALJ Failed to Properly Assess Plaintiff's 20 Credibility

21 1. Applicable law

22 An ALJ's assessment of symptom severity and claimant
23 credibility is entitled to "great weight." See Weetman v.
24 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as amended); Nyman v.
25 Heckler, 779 F.2d 528, 531 (9th Cir. 1985) (as amended Feb. 24,
26 1986). "[T]he ALJ is not 'required to believe every allegation
27 of disabling pain, or else disability benefits would be available
28 for the asking, a result plainly contrary to 42 U.S.C.

1 § 423(d)(5)(A).'" Molina v. Astrue, 674 F.3d 1104, 1112 (9th
2 Cir. 2012) (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.
3 1989)).

4 In evaluating a claimant's subjective symptom testimony, the
5 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
6 at 1035-36. "First, the ALJ must determine whether the claimant
7 has presented objective medical evidence of an underlying
8 impairment '[that] could reasonably be expected to produce the
9 pain or other symptoms alleged.'" Id. at 1036 (quoting Bunnell
10 v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). If
11 such objective medical evidence exists, the ALJ may not reject a
12 claimant's testimony "simply because there is no showing that the
13 impairment can reasonably produce the degree of symptom alleged."
14 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in
15 original).

16 If the claimant meets the first test, the ALJ may discredit
17 the claimant's subjective symptom testimony only if he makes
18 specific findings that support the conclusion. See Berry v.
19 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
20 affirmative evidence of malingering, the ALJ must provide "clear
21 and convincing" reasons for rejecting the claimant's testimony.
22 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as
23 amended); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,
24 1102 (9th Cir. 2014). The ALJ may consider, among other factors,
25 (1) ordinary techniques of credibility evaluation, such as the
26 claimant's reputation for lying, prior inconsistent statements,
27 and other testimony by the claimant that appears less than
28 candid; (2) unexplained or inadequately explained failure to seek

1 treatment or to follow a prescribed course of treatment; (3) the
2 claimant's daily activities; (4) the claimant's work record; and
3 (5) testimony from physicians and third parties. Rounds v.
4 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as
5 amended); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
6 2002). If the ALJ's credibility finding is supported by
7 substantial evidence in the record, the reviewing court "may not
8 engage in second-guessing." Thomas, 278 F.3d at 959.

9 2. Relevant background

10 In an undated disability report, Plaintiff wrote that he had
11 been unable to work since June 4, 2011, because of a knee injury.
12 (AR 152.) In a later disability report, Plaintiff reported that
13 he was "[a]llways in pain," his "knee gives out with no warning,"
14 and "even household chores are difficult." (AR 173, 176.)

15 In a November 2011 questionnaire completed as part of a
16 medical assessment, Plaintiff checked boxes indicating that he
17 had no difficulty with personal self-care activities and could
18 lift, push, and pull "heavy objects" but had "extra discomfort";
19 climb a flight of stairs with "a lot of difficulty"; kneel, bend,
20 and squat with "a lot of difficulty"; and sit or stand and walk
21 for only 15 to 60 minutes at a time. (AR 252-54.)

22 At the August 22, 2013 hearing, Plaintiff testified that he
23 had hurt his left knee when he slipped and fell while trying to
24 get into his truck at work. (AR 40-41.) As a result, his leg
25 became "uncomfortable" after sitting for about 45 minutes, and he
26 needed to move it. (AR 38.) Plaintiff could stand for 15 to 20
27 minutes at a time and walk 20 to 25 feet with a cane. (AR 38-
28 39.) He could lift only the weight of a gallon of milk because

1 he "d[id]n't trust [his] left knee" and was afraid it would "go
2 out from under [him]." (AR 49.)

3 Plaintiff lived with his son and nephew. (AR 36.) He did
4 not help with cleaning, cooking, washing dishes, or other
5 housework, but "once in a while" he did his own laundry or went
6 to the grocery store.³ (AR 37-38.) Plaintiff could no longer
7 drive a truck, but he had a driver's license and had last driven
8 a car the day before the hearing. (AR 36-37.) When he drove, he
9 usually went to the store or a friend's house and back. (AR 51.)
10 If Plaintiff had to drive a long distance, he had someone drive
11 him because he had to "move [his] leg all the time" in order to
12 be comfortable. (AR 51-52.) Plaintiff testified that he could
13 not work at a full-time "desk job" because he couldn't "get [his
14 left] leg comfortable," stating that the discomfort was not a
15 "throbbing pain, it's just uncomfortable." (AR 45-46.)

16 In a January 2014 questionnaire completed as part of a
17 medical assessment, Plaintiff checked boxes indicating that his
18 self-care activities were "uncomfortable" and he performed them
19 slowly. (AR 385.) He could lift, push, and pull only "light to
20 medium objects"; climb a flight of stairs, kneel, bend, and squat
21 with "[a] lot of difficulty"; and sit or stand and walk between
22 15 and 30 minutes at a time.⁴ (AR 385-86.)

24 ³ Plaintiff testified that before his injury, he helped "a
25 little bit" with the household chores and cooked "[v]ery little."
26 (AR 46-47.) Plaintiff said he no longer cooked because he "ha[s]
just never been a big cooker," not because of his injury. (Id.)

27 ⁴ Plaintiff submitted to the Appeals Council Dr. David L.
28 Wood's January 2014 "Agreed Medical Re-examination Report," which
(continued...)

1 3. Analysis

2 The ALJ found that although Plaintiff's "medically
3 determinable impairment could reasonably be expected to cause the
4 alleged symptoms," his "statements concerning the intensity,
5 persistence and limiting effects of these symptoms" were not
6 entirely credible. (AR 16.) As discussed below, he failed to
7 provide sufficiently clear and convincing reasons for doing so.

8 The ALJ determined that "objective findings" failed to
9 support Plaintiff's alleged limitations (AR 18), but he simply
10 summarized the medical evidence without pointing to anything
11 specific that was inconsistent with Plaintiff's subjective
12 complaints (see AR 16-18). Nor did he reject or discredit any of
13 the medical-opinion evidence. In fact, much of the medical
14 evidence supports Plaintiff's alleged limitations. A September
15 2011 MRI of Plaintiff's left knee showed mild chondromalacia,⁵
16 degenerative changes of the medial meniscus without evidence of a
17 tear, possible "minimal fraying" of the medial meniscus, possible
18 mild chronic spraining and scarring, and patellar tendinosis.⁶

19 _____
20 ⁴ (...continued)
21 included the questionnaire. (AR 385.) Although it postdates the
22 ALJ's decision by a few months, the Appeals Council made it part
23 of the record, and the Court assumes the Council considered it to
the extent it was relevant to the time period predating the ALJ's
decision. See Brewes, 682 F.3d at 1162-63.

24 ⁵ Chondromalacia is a condition in which the patella rubs
25 against one side of the knee joint, causing irritation and pain.
Chondromalacia, Cedars-Sinai, [https://www.cedars-sinai.edu/](https://www.cedars-sinai.edu/Patients/Health-Conditions/Chondromalacia.aspx)
26 Patients/Health-Conditions/Chondromalacia.aspx (last accessed May
2, 2016).

27 ⁶ Tendinosis is a degeneration of the tendon's collagen in
28 (continued...)

(AR 329-30.) Plaintiff's doctors often noted that he had decreased range of motion (AR 235, 275, 311, 344, 348, 354) and tenderness of the left knee (AR 195, 207, 218, 227, 229, 231, 233, 235, 247, 276, 311, 321-22, 344, 348, 354) and walked with an antalgic gait and a limp (AR 218, 227, 229, 231, 233, 235, 310). Plaintiff alleged that as result of his condition, he had difficulty climbing stairs, kneeling, and squatting, and many of his doctors found that he should avoid such activities. (See AR 207-08 (June 2011, doctor placing Plaintiff on "modified activity," with no climbing stairs or ladders, squatting, kneeling, or driving his company vehicle), 219 (June 2011, doctor stating, "no climbing stairs or ladders" and "unable to drive company vehicle"), 227 (Aug. 2011, doctor noting, "[n]o climbing stairs or ladders," "[n]o squatting or kneeling," "[u]nable to drive company vehicle"), 229 (same), 231-32 (same), 233-34 (Aug. 2011, doctor noting, "[n]o climbing stairs or ladders" and "[n]o squatting or kneeling"), 236 (Aug. 2011, doctor noting that Plaintiff must wear brace and could not climb stairs or ladders, squat, or kneel), 311 (May 2012, noting that Plaintiff had difficulty squatting and kneeling); but see AR 225 (July 2011, doctor releasing Plaintiff to "[r]egular job duty"), 238 (Sept. 2011, doctor releasing Plaintiff to full duty without restriction).)⁷ Because the ALJ did not reject any of these

⁶ (...continued)
response to chronic overuse. Karim M. Kahn, M.D., PhD. et al., Overuse Tendinosis, Not Tendinitis, 28 The Physician and Sportsmedicine (May 2000).

⁷ Dr. Wood's January 2014 "Agreed Medical Re-examination
(continued...)

1 doctors' opinions, he erred in concluding that the medical
2 evidence failed to support Plaintiff's subjective complaints.

3 Nor was Plaintiff's treatment inconsistent with his
4 complaints. His left-knee condition was initially treated with
5 medication, physical therapy, a knee brace, and injections.
6 (See, e.g., AR 198-205, 209-17, 327-28 (physical therapy notes),
7 276 (June 2011, medication and injection), 225 (July 2011,
8 injection), 235 (Aug. 2011, noting Plaintiff's medications and
9 that only response to injection was that knee was "puffy"), 249
10 (Nov. 2011, Dr. David L. Wood recommending further injections
11 and, if injections not successful, surgery), 362 (May 2012,
12 noting that Plaintiff was prescribed knee brace and medications
13 Ultram and Anaprox).)⁸ In April 2013, Plaintiff underwent left-
14 knee arthroscopic surgery followed by more physical therapy. (AR
15 334-36; see also AR 332 (Dr. Wood recommending arthroscopic
16 surgery), 344, 348, 354, 362 (Dr. Manuel Anel recommending
17 arthroscopic surgery), 368 (Dr. Anel noting that Plaintiff

18
19 ⁷ (...continued)
20 Report," which Plaintiff submitted to the Appeals Council,
21 similarly stated that Plaintiff's condition was "permanent and
22 stationary" for purposes of his worker's-compensation claim and
23 that he was precluded from "repetitive kneeling, squatting,
24 crawling, and climbing and from prolonged weightbearing for the
25 left knee condition." (AR 372, 381.)

26 ⁸ Ultram, a brand name for tramadol, is a narcotic used to
27 relieve moderate to moderately severe pain. Tramadol,
28 MedlinePlus, <https://www.nlm.nih.gov/medlineplus/druginfo/meds/a695011.html> (last updated Apr. 21, 2016). Anaprox, a brand name
for naproxen, is a nonsteroidal antiinflammatory drug used to
relieve pain, tenderness, swelling, and stiffness caused by
arthritis and other conditions. Naproxen, MedlinePlus,
<https://www.nlm.nih.gov/medlineplus/druginfo/meds/a681029.html>
(last updated Sept. 15, 2015).

1 underwent "left knee arthroscopy with postoperative
2 rehabilitative physical therapy").) In August 2013, Dr. Anel
3 noted that despite the surgery, Plaintiff's left knee remained
4 "significantly symptomatic," with pain, stiffness, some
5 instability, "significant crepitation," and limited range of
6 motion. (AR 368.) Dr. Anel noted that Plaintiff's left knee
7 would lock and give way and that he was using a single crutch to
8 walk because of "feelings of instability." (Id.) Dr. Anel
9 recommended a total knee replacement. (Id.) The ALJ therefore
10 erred in finding, without adequate explanation, that Plaintiff's
11 complaints were "not substantiated by the objective medical
12 evidence." (AR 16.)

13 The ALJ also discounted Plaintiff's subjective complaints
14 based on his daily activities. A plaintiff's daily activities
15 can serve as a valid reason for discounting his credibility when
16 they either indicate "capacities that are transferable to a work
17 setting" or are "inconsistent with the alleged symptoms."
18 Molina, 674 F.3d at 1112-13. Here, the ALJ noted that Plaintiff
19 had a driver's license and that he drove, shopped, did his own
20 laundry, and could lift a gallon of milk. (AR 18.) But
21 Plaintiff in fact testified that his activities were somewhat
22 more limited than that: he went to the store and did laundry only
23 "once in a while" (AR 38) and had someone drive him if he had to
24 travel long distances (AR 51-52). Plaintiff, moreover, testified
25 that he didn't do any other household chores, like washing dishes
26 or cooking. (AR 37-38.) In any event, nothing about Plaintiff's
27 limited activities was inconsistent with his alleged symptoms,
28 nor do they indicate capacities that are transferable to a work

1 setting. As such, the ALJ erred in relying on Plaintiff's daily
2 activities to discount his credibility. See Aparicio v. Colvin,
3 ___ F. App'x ___, 2015 WL 9461608, at *2 (9th Cir. Dec. 28, 2015)
4 (ALJ erred in discounting credibility based on Plaintiff's
5 ability to do housework with rest breaks); Vertigan v. Halter,
6 260 F.3d 1044, 1050 (9th Cir. 2001) ("[T]he mere fact that a
7 plaintiff has carried on certain daily activities, such as
8 grocery shopping, driving a car, or limited walking for exercise,
9 does not in any way detract from [his] credibility as to [his]
10 overall disability.").

11 The ALJ also discounted Plaintiff's credibility because
12 "[t]here is no evidence [that Plaintiff] has had excruciating
13 pain, such that he has had to [s]eek emergency room treatment."
14 (AR 18.) Plaintiff, however, never testified that his pain was
15 "excruciating"; rather, he testified that the knee did not cause
16 him "throbbing pain" but just made him "uncomfortable." Indeed,
17 many of his limitations seemed to be based on his knee "giving
18 out" or arose from certain activities, such as climbing stairs,
19 kneeling, and prolonged walking, that exacerbated his condition.
20 In any event, as discussed above, Plaintiff clearly underwent
21 significant treatment for his knee injury, including medication,
22 injections, and surgery, even if he didn't seek treatment in an
23 emergency room.

24 Two of the ALJ's observations might provide some basis for
25 discounting Plaintiff's credibility, however. First, the ALJ
26 noted that Plaintiff had stopped working only because his
27 employer did not have work that he could perform with
28 restrictions on climbing stairs or ladders, squatting, kneeling,

1 and driving company vehicles, not because he was unable to
2 perform any work.⁹ (AR 18); cf. Bruton v. Massanari, 268 F.3d
3 824, 828 (9th Cir. 2001) (as amended) (ALJ properly discounted
4 credibility when plaintiff left job because he was laid off, not
5 because he was injured). Second, the ALJ relied on a Social
6 Security Administration employee's notation that he had met with
7 Plaintiff in person but "did not notice a limp" or Plaintiff's
8 having any difficulty sitting, standing, or walking. (AR 18,
9 149); 20 C.F.R. § 404.1529(c)(3) (in evaluating symptoms, ALJ
10 will consider "observations by our employees"); SSR 96-7P, 1996
11 WL 374186, at *8 (July 2, 1996) ("In evaluating the credibility
12 of the individual's statements, the adjudicator must also
13 consider any observations recorded by SSA personnel who
14 previously interviewed the individual, whether in person or by
15 telephone."). But in light of the errors discussed above, these
16 two reasons, alone, are insufficient to support the ALJ's
17 credibility determination.

18 B. Remand for Further Proceedings Is Appropriate

19 When, as here, an ALJ errs in denying benefits, the Court
20 generally has discretion to remand for further proceedings. See
21 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as
22 amended). When no useful purpose would be served by further
23 administrative proceedings, however, or when the record has been
24 fully developed, it is appropriate under the "credit-as-true"
25

26 ⁹ Despite this observation and the many doctors'
27 unchallenged opinions that Plaintiff could not do much if any
28 climbing, squatting, kneeling, or driving, the ALJ did not
include any such restrictions in the RFC. (See AR 16.)

1 rule to direct an immediate award of benefits. See id. at 1179
2 (noting that "the decision of whether to remand for further
3 proceedings turns upon the likely utility of such proceedings");
4 Garrison v. Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

5 Under the credit-as-true framework, three circumstances must
6 be present before the Court may remand to the ALJ with
7 instructions to award benefits:

8 (1) the record has been fully developed and further
9 administrative proceedings would serve no useful purpose;

10 (2) the ALJ has failed to provide legally sufficient
11 reasons for rejecting evidence, whether claimant
12 testimony or medical opinion; and (3) if the improperly
13 discredited evidence were credited as true, the ALJ would
14 be required to find the claimant disabled on remand.

15 Garrison, 759 F.3d at 1020; Treichler, 775 F.3d at 1100-01.

16 When, however, the ALJ's findings are so "insufficient" that a
17 court cannot determine whether the rejected testimony should be
18 credited as true, the Court has "some flexibility" in applying
19 the credit-as-true rule. Connett v. Barnhart, 340 F.3d 871, 876
20 (9th Cir. 2003); see also Garrison, 759 F.3d at 1020 (noting that
21 Connett established that credit-as-true rule may not be
22 dispositive in all cases); Treichler, 775 F.3d at 1101 (noting
23 that remand for benefits is inappropriate when "there is
24 conflicting evidence, and not all essential factual issues have
25 been resolved"); see also Dominguez v. Colvin, 808 F.3d 403, 409
26 (9th Cir. 2015) (noting that when "outstanding issues . . .
27 exist, the district court cannot deem the erroneously disregarded
28 testimony to be true; rather, the court must remand for further

1 proceedings").

2 Here, remand for further proceedings is appropriate. It may
3 be that the ALJ had adequate reasons to find Plaintiff not
4 entirely credible and simply failed to express them; his findings
5 are insufficient to enable the Court to tell. Moreover, even if
6 some of Plaintiff's complaints should be credited - such as his
7 asserted difficulties climbing and kneeling - it is not clear
8 that all of them should be. Plaintiff's condition also appears
9 to have worsened over time, so some limitations may have arisen
10 at some point after his alleged onset date, in June 2011. Once
11 the ALJ has determined which of Plaintiff's complaints should be
12 credited, he must then reassess Plaintiff's RFC and whether
13 sufficient jobs exist that he can perform. And although it
14 appears that the ALJ adequately considered Plaintiff's obesity
15 (see, e.g., AR 15, 17-18), on remand he may make any additional
16 findings necessary regarding that condition. The ALJ may also
17 explicitly address the new evidence submitted to the Appeals
18 Council. Finally, although Plaintiff did not raise this issue,
19 the ALJ should either expressly discredit the various doctors'
20 opinions imposing additional limitations or consider
21 incorporating some of those limitations into the RFC.

22 VI. CONCLUSION

23 Consistent with the foregoing, and pursuant to sentence four
24 of 42 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered

26 ¹⁰ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
(continued...)

1 REVERSING the Commissioner's decision, GRANTING Plaintiff's
2 request for remand, and REMANDING this action for further
3 proceedings consistent with this Memorandum Opinion. IT IS
4 FURTHER ORDERED that the Clerk serve copies of this Order and the
5 Judgment on counsel for both parties.

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7 DATED: May 6, 2016


8 JEAN ROSENBLUTH
9 U.S. Magistrate Judge
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28 ¹⁰ (...continued)
cause for a rehearing."